

Memo on Proposed Rule 8.4 Prohibiting Harassment/Discrimination

To: Advisory Committee on Rules
From: Joshua Gordon, Esq.
Date: February 13, 2018

I was tasked with looking further into the proposal to add a harassment and discrimination to the definition of “misconduct” in Professional Conduct Rule 8.4.

I interviewed several women attorneys who are in leadership positions in New Hampshire law firms, attorneys who have been subject to harassment or discrimination, and law firm staff members who have been subject to harassment or discrimination.

There are several groups of concerns that have come out of these conversations.

First, the proposed rule may not be in keeping with what appears to be the overall intent of professional conduct rules generally – to protect clients. The proposal may be the first ethics rule that would seek to protect lawyers and law firm staff members, in addition to their clients.

Second, and related, it must be noted that “[t]he Rules are not designed to be a basis for civil liability,” N.H. R.PROF.COND., *Statement of Purpose*, and are not designed to be punitive. *State v. Merski*, 121 N.H. 901, 909 (1981) (“The purpose of lawyer discipline is not to punish the attorney, but to maintain appropriate standards of professional conduct for the protection of the public and the maintenance of public confidence in the bar.”). If a complainant proved damage by harassment or discrimination against an attorney under the proposed rule, the complainant would not be benefitted, but the lawyer would get disciplined. Thus the rule may be solely punitive.

Third, while “harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, or marital status” is something of which most of us would like to rid the world, “harassment” and “discrimination” are terms not easily defined, and not self-defining. The attorney discipline system may be adept at policing lawyers, but it may not be the forum to determine when an instance of “harassment” or “discrimination” has occurred, or to get involved with employment discrimination within a law firm. These matters appear to be in the expertise of others, such as the Human Rights Commission (HRC), which is statutorily tasked with discrimination enforcement; circuit courts, which regularly hear criminal and domestic harassment claims; and juries, which find facts in employment discrimination cases.

Fourth, the proposed rule may complicate employment issues at law firms. If an instance or course of conduct is such that it could meet the “clear and convincing” standard of proof in attorney discipline matters, *Edes’ Case*, 118 N.H. 815 (1978), it probably also meets other attorneys’ duty to report. N.H. R.PROF.COND. 8.3(a) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a *substantial question* as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”) (emphasis added).

If a lawyer were behaving badly toward the firm’s staff, there are steps that can be taken by the lawyer’s supervisor or partners. But if such bad behavior warranted reporting, it may disempower the firm from internally addressing the problem. It might also create conflicts within the firm by pitting those with a duty to report, against their own partner – for behavior that may have had no detrimental effect on any client. Moreover, the proposed rule does not contain an anti-retaliation provision: if a lawyer harassed a staff member, and that employee reported the harassment, a lawyer’s response may be to fire the person or make their job situation untenable.

Fifth, under the proposal, whether intended or not, pay discrimination may be an ethics violation.

Despite these issues, law firm staff members who I have interviewed and have been the target of harassment or discrimination like the idea of spelling out that harassment and discrimination is not welcome in the workplace. Although it appears that larger firms have written policies, smaller firms might not. Also, firms with fewer than 6 employees are exempt from HRC jurisdiction, RSA 354-A:2, VII.

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It is possible that some of these issues can be addressed by limiting the rule to harassment and discrimination *against a client*. This would eliminate coverage for law firm staff, but would put the proposed rule firmly within the broad intent of the rules of professional conduct, would allow the attorney discipline system to exercise its expertise in protecting the public, and would avoid complications in employment relations and pay rates.

Thus, an amended proposal might be:

It is professional misconduct for a lawyer to:

...

(g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination against a client on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, or marital status. This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.